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FEDERAL MARITIME COMMISSION

Docket NO. 01-06 - EXCLUSIVE TUG FRANCHISES - MARINE TERMINAL OPERATORS SERVING THE LOWER MISSISSIPPI RIVER	Docket No. 01-06

Served: April 12, 2002

ORDER

I. INTRODUCTION

On June 11, 2001, the Commission issued an Order to Show Cause in the above-captioned proceeding directing certain marine terminal operators on the lower Mississippi River to show cause why they have not violated sections 10(d)(1) and 10(d)(4) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§ 1709(d)(l) and (d)(4). Soon thereafter, certain Respondents filed requests for discovery. On June 22, 2001, the Commission issued an order referring all discovery issues to the Office of Administrative Law Judges ("ALJs"). On October 15, 2001, in response to various motions by the parties regarding discovery and the structure of the proceeding, the Commission issued an order establishing a new procedural schedule and referring the proceeding to an ALJ for an initial decision. Subsequently, on January 2, 2002, the ALJ issued rulings concerning discovery and a protective order. ("ALJ's Order"). The Bureau of Enforcement ("BOE") appealed that Order on January 14, 2002, pursuant to 46 C.F.R. § 502.208(c), which allows the Commission to review discovery rulings with regard to Commission documents. The

ALJ granted Respondents Bunge North America, Inc. ("Bunge") and ADM/Growmark River Systems, Inc. ("ADM") leave to appeal his Order as well and certified these appeals to the Commission on January 29, 2002. Car-gill, Inc. filed a reply in support of ADM's appeal. Cargill, Inc., St. James Stevedoring Company Inc., L&L Fleeting and GETCO, Bunge, and Zen-Noh Grain Corporation and Consohdated Grain & Barge Co., Inc., all filed replies or oppositions to BOE's appeal. BOE filed replies in opposition to the appeals of ADM and Bunge.

These appeals and cross appeals are currently before the Commission for decision.

II. RULINGS CONCERNING DISCOVERY AND ISSUANCE OF PROTECTIVE ORDER

In his Order, the XLJ addressed whether Respondents should receive certain materials that Commission staff obtained pursuant to section 15 orders and informal requests, as well as memoranda, research, correspondence, and other staff-generated materials used to support the Commission's issuance of the Order to Show Cause. ALJ's Order at 2. BOE objected to furnishing these materials, claiming various privileges, including: deliberative process, attorney work product, attorney-client, and informant's privileges. The ALJ noted that, with the exception of the attorney-client privilege, all these privileges may be overcome by the seeking party demonstrating a substantial need to see the requested information. Id. The ALJ determined that due to the sensitive nature of the requested materials, he would review the materials *in **camera,*** with the assistance of a Vaughn index[1] listing

[1]This index is a list comprised of the documents BOE claims are privileged and specifies which privileges apply. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

the documents and specifying the asserted privilege. The ALJ ordered that BOE prepare a redacted version of the Vaughn index for Respondents. Id. After reviewing the documents covered by the Vaughn index, the ALJ decided that many of these documents should be disclosed, but that a protective order should issue to protect the disclosure of certain documents.

The XLJ classified the documents based upon BOE's asserted privileges. A large number of the documents withheld were based on BOE's assertion of what the XLJ termed the "so-called mformant's or informer's privilege." ALJ's Order at 5. BOE contended that these documents were protected because "[t] he offer of confidentiality furthers an important public policy of encouraging informants to provide information they might not otherwise make without such assurances." Id. The XLJ noted that this privilege is a qualified one, and may be overridden to ensure a fair proceeding by the seeking party demonstrating a substantial need for the information. Id. The ALJ directed BOE to furnish copies of these documents to Respondents subject to the terms of the protective order.

The smaller portion of requested documents withheld by BOE involved BOE's claims of deliberative process, attorney work product, and attorney-client privileges. The ALJ noted that, with the exception of the attorney-client privilege, the deliberative process and attorney work product privileges are also qualified ones, and may also be overridden by establishing a substantial need for the requested information. Of these documents, BOE asserted the deliberative process and attorney work product privileges for the majority. The ALJ determined that these documents should be provided to Respondents, but under the terms of the protective order. ALJ's Order at 12.

The XLJ concluded that the remaining 11 documents were

subject to the attorney-client privilege which, unless waived, is an absolute privilege. While he concluded that the eleventh document, Bates numbers 2380-2404, was privileged, the XLJ nonetheless ordered its disclosure. This document consists of a memorandum transmitting a draft section 15 order and draft questions to various businesses that might be involved in the subject exclusive franchise practice or be affected by the same, and various attachments containing a draft section 15 order, letter of inquiry, and a list of carriers. ALJ's Order at 14. The XLJ determined that this document could be furnished to Respondents, as the section 15 order and letters of inquiry are now public documents, and because these materials and the cover memorandum would not reveal Commission confidences in an attorney-client context. Id.

The ALJ's protective order establishes a single tier of confidentiality designated as "Restricted Confidential Information." Protective Order ¶4. Access to such information will be limited to outside counsel, independent experts, one designated in-house counsel not involved in "competitive decisionmaking" and one designated employee of each respondent. In addition, any party may request that an additional "Qualified Person" be permitted to see such information. Protective Order ¶3. Each of the parties to the proceeding, including BOE, is required to sign a consent order. Id. Any proceeding in which confidential information may be disclosed will be held in closed session, and such confidential information may be returned or destroyed after final disposition of this proceeding unless entered into evidence. Protective Order ¶¶ 9, 12, and 14.

III. POSITIONS OF THE PARTIES

BOE appeals the ALJ's decision to release documents to

which the deliberative process and attorney work product privileges apply. BOE argues that the deliberative process privilege applies to certain of the documents because they were predecisional and part of the deliberative process occurring on a staff level designed to result in a recommendation for the Commission's consideration. BOE's Appeal at 8. BOE further argues that the documents are also shielded from discovery by the attorney work product privilege. BOE asserts that the draft memoranda and attorney-created spreadsheets/compilations were created in anticipation of litigation not in the ordinary course of business and therefore should be accorded the attorney work product privilege. Id. BOE further asserts that documents reflecting research conducted by Commission staff should also be covered by the work product privilege because revelation of the data would tend to reveal the mental process of the attorney requesting the data. BOE's Appeal at 11. Moreover, BOE contends that the information is available to the public at a reasonable cost and that Respondents have not met the burden required to overcome the privilege. Id. BOE further requests that the Commission clarify whether documents provided to it by each of the Respondents in response to the information requests are to be produced by BOE to other Respondents. BOE's Appeal at 14.

Respondent Cargill, Inc. ("Cargill") asserts two primary arguments in its Reply to BOE's appeal. First, Cargill argues that the ALJ properly concluded that Respondents should be given access to documents claimed to be protected by the deliberative process privilege. Cargill's Reply at 3. Car-gill contends that a substantial need exists and that the XLJ is in the best position to determine whether BOE's assertion of the deliberative process privilege warrants the withholding of such documents. Id. Cargill further contends that BOE's assertion of the deliberative process privilege appears to be erroneous for the following reasons: the

documents may not reflect the give and take of the deliberative process; some of the documents contain purely factual matters, which are not intended to be protected by the privilege; and the underlying policy considerations of the privilege are satisfied by the ALJ's release of the documents to limited persons involved in the proceeding and not the general public. Id. Second, Cargill argues that it should have access to those documents claimed to be protected by the work product privilege. Cargill's Reply at 6. Car-gill contends that the ALJ was correct in ruling that Respondents must be given access to the documents BOE claims are covered by the attorney work product privilege because Respondents will not be able to prepare adequately for cross-examination and the documents may not qualify for the privilege, as memoranda may have been prepared in the ordinary course of business and not in anticipation of litigation. Id.

Respondent St. James Stevedoring Company, Inc. ("St. James") along with Respondent Zen-Noh Grain Corporation and Consolidated Grain & Barge Co., Inc. ("Zen-Noh") contend that because they have not had the opportunity to review the documents that BOE claims are covered by the deliberative process and attorney work product privileges, they are unable to comment on the validity of BOE's contentions regarding the application of these privileges or whether BOE's characterization is accurate. See St. James' Appeal at 1 and Zen-Noh's Appeal at 4.

Respondents ADM and Bunge raise several concerns about the application of the protective order in their appeals of the ALJ's Order. ADM, joined by Cargill, is generally concerned that information submitted under the protective order remains vulnerable to disclosure outside the instant proceeding, and requests the protective order be clarified to reflect that BOE is required to sign the protective order. ADM's Appeal at l-5.

Bunge submits that the discovery responses provided by Respondents only to BOE, per the terms of the protective order, ought to be produced to each other Respondent as well. In addition, Bunge argues that the protective order should include a second tier of confidentiality for "attorney's eyes only." Bunge's Appeal at l-11.

IV. DISCUSSION

A. Applicability of Deliberative Process. Xttornev Work Product. and Xttornev-Client Privileges

In the instant matter, BOE asserts both the deliberative process and attorney work product privileges for most of the documents in question. We find that both privileges apply and that because Respondents have not shown a substantial need for the documents, the ALJ's decision to release such documents should be reversed. With respect to the document that the ALJ claimed fell under the attorney-client privilege, (Bates Nos. 2380-2404) but nonetheless ordered disclosed to Respondents, we believe that the privilege does in fact apply and may only be waived by the "client," the Commission. We accordingly, will not waive the privilege in this instance. We will discuss the applicability of each privilege individually.

1. Deliberative Process

The ALJ found that documents BOE withheld claiming the deliberative process privilege should be disclosed to Respondents. He noted that the deliberative process privilege may be overriden if the seeking party shows a need to see them in order to prepare its defense. He stated that these documents would be made available to Respondents only pursuant to the strict protective order he issued. ALJ's Order at 12.

The deliberative process privilege protects the "consultative functions" of government by maintaining the confidentiality of "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Jordan v. United States Dept. of Tustice, 591 F.2d 753, 772 (1978) (citing Carl Zeiss Stiftune v. V.E.B. Carl Zeiss. Jena, 40 F.R.D. 318 (D.C. 1966)). The privilege attaches to inter- and intra-agency communications that are a part of the deliberative process preceding the adoption and promulgation of an agency policy. Id.

In Jordan, the court held that there are three policy bases for the privilege:

> First, it protects creative debate and candid consideration of alternatives within an agency, thus improving the quality of agency policy decisions. Second, it protects the public from confusion that would result from premature exposure to discussions occurring before the policies effecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided[,] not for matters they considered before making up their minds."

Id. (citing Grumman Aircraft Ene. Corp. v. Reneeotion Bd., 421 U.S. 168 (1975) (internal references omitted).

In order for a document to be covered by this privilege and shielded from disclosure, two prerequisites must be met. First, the document must be "pre-decisional." The privilege protects communications between superiors and subordinates that actually precede the adoption of the agency policy. Second, it must be

"deliberative," i.e., "actually related to the process by which policies are formulated." Jordan, 591 F.2d at 774. In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp. v. Dept. of Enerw, 617 F.2d 854,868 (D.C. Cir. 1980). Additionally, it is not enough that the document be used in the determination of a policy, it must also directly be part of the give-and-take of the agency's deliberative process for the privilege to apply. Id. (citing Vauehn v. Rosen, 173 U.S. App. D.C. 193, 194-95.)

In its appeal, Cargill argues that predecisional documents lose their deliberative status if the postdecisional memorandum adopts or incorporates the predecisional findings. Cargill Appeal at 3 (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F. 2d at 866 (D.C. Cir. 1980).

Applying the standards established for the deliberative process privilege, it appears that certain documents withheld by BOE qualify for the deliberative process privilege. The documents with Bates numbers from 2469-2656, 2789-2794, 2821-2822, 2831-2834, 2881, and 3048-3049 may be sorted into two categories: draft memoranda containing recommendations prepared by BOE attorneys with the assistance of Commission staff; and correspondence between BOE attorneys, BOE investigators and attorneys in the Office of General Counsel.

These documents satisfy both prerequisites of the deliberative process privilege.[2] First, they are pre-decisional. The

[2]In the Vaughn Index, BOE has asserted the deliberative process privilege for documents with Bates numbers 2246-2455, 2457-

draft memoranda prepared by BOE attorneys were intra-agency communications, which were part of the deliberative process preceding the adoption of the Commission's decision to ultimately issue the Order. Second, these documents are deliberative. As the Court held in Vaughn v. Rosen, the document must be used not only in the determination of a policy, but also be directly part of the give-and-take of the agency's deliberative process. The draft memoranda in question, documents with Bates numbers 2469-2618, were clearly part of BOE's decision-making process to recommend to the Commission that an Order be issued. Moreover, before the issuance of an order, BOE, in conjunction with other Commission staff, should be able to candidly discuss which actions the Commission might take during an investigation and whether to institute a proceeding. Therefore, we conclude that the draft memoranda and other communications as specified above qualify for the deliberative process privilege.

2. Xttornev Work Product

BOE also withheld documents asserting the attorney work product privilege, and now contests the ALJ's order that such

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2705, and 271 l-3406. While certain of these documents do qualify for the deliberauve process privilege (2246-2370, 2371-2455, 2457-2656, 2789-2794, 2821-2822, 2831-2834, 2881, and 3048-3049), we beheve that documents with Bates numbers 2657-2705, 271 l-2788,2795-2820, 2823-2830, 2835-2880, 2882-3047, and 3050-3406 have been misclassified as they do not reflect communications in the process of deliberation, and rather only the attorney work product privilege applies. Furthermore, we note that while documents with Bates numbers 2246-2370 were generated in another Commission proceeding, River Panshes Company, Inc. v. Ormet Primary Aluminum Corp., 28 S.R.R. 751 (1999), the deliberanve process pnvilege still applies, thus shielding these documents from discovery.

materials should be made available to Respondents in discovery under the protective order. Cargill argues that the ALJ properly concluded that Respondents should be given access to documents the ALJ found to be protected by the work product privilege. Cargill asserts that it, along with the other Respondents, would not be able to adequately prepare for cross-examination without these documents. Cargill's Appeal at 6. Cargill further asserts that the work product doctrine may not even be applicable, as the Commission may have prepared such documents in the ordinary course of business.

Here, BOE has asserted the attorney work product privilege for draft memoranda; notes, analyses, and communications; attorney-created spreadsheets/compilations; and research performed on an attorney's behalf.[3] BOE's Appeal at 7.

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in pertinent part that:

> a party may obtain discovery of documents and tangible things. . .prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative. . .only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been

[3]We note that documents with Bates numbers 2246-2370 were generated in another Commission proceeding, River Parishes Company, Inc. 28 **S.R.R.** 751 (1999). The attorney work product privilege still appbes and shields these documents from discovery in this proceeding.

> made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3) (emphasis added).[4] The foundation of this rule was articulated in Hickman v. Tavlor, where the Court held that to require attorneys to produce the materials an attorney prepares on his clients' behalf on mere demand would have a "demoralizing effect on the legal profession," as it would cause much written material to remain unwritten, and thus would poorly serve the interests of clients and the cause of justice. 329 U.S. 495, 511 (1947).

Hickman and its progeny, Doe v. United States, 662 F. 2d 1073 (4th Cir. 1981) cert. denied, 455 U.S. 100 (1982), divide work product into two categories: opinion work product material that is "absolutely" immune from discovery, such as mental impressions, conclusions, opinions, or legal theories concerning the litigation; and other qualifiedly immune material such as all other documents and tangible things prepared in anticipation of litigation, which may be discovered but only on a showing of substantial need.

It is not only the documents that are protected under this privilege, but also the selection process itself. In Sporck v. Peil, a case involving extensive discovery, the court held that "'the process of selection and distillation is often more critical than

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[4]Rule 12 of the Commission's Rules of Practice and Procedure provides that: In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice. 46 C.F.R. § 502.12.

pure legal research."' 759 F.2d 312, 315 (3d Cir. 1985) (citing James Tulian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982)). The court also found that "opinion work product includes such items as an attorney's legal strategy, the intended lines of proof, and the evaluation of the strengths and weaknesses of the case." The adversary system's interest generally outweighs whatever factual content such material may possess; therefore, this material is often afforded absolute protection from discovery. Sporck, 759 F.2d at 316.

BOE's assertion of the privilege is warranted. The draft memoranda and notes, analyses, and communications are clearly protected by the attorney work product privilege. Some of these documents reflect mental impressions, conclusions, and opinions of the attorney authors and therefore are absolutely immune from discovery. See Doe v. U.S., supra. These documents were also created in anticipation of litigation and not in the ordinary course of business.

The attorney created spreadsheets/compilations and research conducted on an attorney's behalf are also shielded from discovery. The attorney work product privilege applies not only to mental impressions but also to other documents and tangible things prepared in anticipation of litigation. Moreover, with respect to compilations and research, the attorney work product privilege also applies to the selection process and systematic organization of information. Furthermore, the attorney work product privilege applies because the memoranda, notes, analyses, communications, attorney created spreadsheets/compilations and research conducted by an attorney or on an attorney's behalf were created in anticipation of litigation, not in the ordinary course of business.

Accordingly, we believe that the attorney created

spreadsheets/compilations and research conducted and organized by or on behalf of an attorney qualify for the attorney work product privilege. Thus, we affirm that those documents with Bates numbers 2657-2674, 2676-2705, 2711-2788, 2795-2820, 2823-2830, 2835-2880, 2882-3047, and 3050-3406 qualify for the attorney work product privilege.

Documents that are qualifiedly immune from discovery, such as those that fall under the deliberative process privilege and some that fall under the attorney work product privilege, are in fact discoverable if the seeking party can demonstrate a substantial need for the information. See ALJ's Order at 10-12; F.R.C.P. 26(b)(3). In this regard, none of the Respondents addressed the substantial need issue in their appeals. Further, the ALJ did not discuss in detail his finding that the parties had established such a need. Such a finding was merely implicit in his decision to make the documents available. Without a demonstration of substantial need, the seeking party is not entitled to the information. Much of the research compilations are comprised of information that is publicly available. Respondents are not entitled to the selection and organization of such research, which involves the attorney's reasoning in marshalling data, unless they can demonstrate that the substantial equivalent of the factual materials is not available elsewhere without undue hardship. "The general policy against invading the privacy of an attorney's course of preparation is so well-recognized and so essential to the orderly working of our legal system that the burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." See Hickman, 329 U.S. at 512. No such showing has been made here. Therefore, we find that the documents discussed herein should not be released to Respondents.

3. Attorney-Client Privilege

In the civil discovery context, the Supreme Court has emphasized the public policy underlying the attorney-client privilege - "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn v. United States, 449 U.S. 383,389 (1981). The Supreme Court in Upjohn concluded that the privilege encompasses confidential communications made to the attorney not only by decision-making "control group" personnel, but also by lower-echelon employees. Id. In addition, "the purpose of the attorney-client privilege is to promote freedom of consultation between client and lawyer by eliminating fear of subsequent compelled legal disclosure of confidential communications." U.S. v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987). However, "once waived, the attorney-client privilege cannot be reasserted." Id. at 1161.

The ALJ found that all 11 documents for which BOE asserted the attorney-client privilege were in fact covered by the privilege. However, he ordered that one document be disclosed to Respondents, a memorandum transmitting a draft section 15 order and draft questions to various businesses. ALJ's Order at 14. He maintained that no harm would result if revealed to Respondents, as the materials did not reveal confidences from the Commission, which the Commission is entitled to protect as the "client" within the context of the attorney-client privilege.

With respect to the document, it is irrelevant whether the information contained within reveals "confidences" from the Commission. The attorney-client privilege protects communications made between a client and an attorney. Confidences regarding the client need not have been revealed for the privilege to apply. In addition, as the ALJ recognized, the

privilege may be waived only by the client. See e.g., Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967).

The XLJ further noted in dicta that it is the General Counsel, not BOE who acted as the Commission's legal advisor prior to the institution of the instant proceeding. ALJ's Order at 15. While not determinative of any issue in the instant order, we believe the ALJ's characterization was incorrect and should be clarified.

The Commission is authorized to investigate activity that may constitute possible violations of the Shipping Act prior to the initiation of a formal adjudicatory proceeding to determine whether violations have in fact occurred. In the period of time before a formal proceeding begins, attorneys from BOE act as advisors to the agency, recommending whether to initiate a proceeding. See 46 C.F.R. 501.5(i)(5) (2001) (the Bureau of Enforcement "conducts investigations leading to enforcement action").

It has long been held that the same person or persons may not participate in the investigation and subsequent adjudication of a proceeding. See Withrow v. Larkin, 421 U.S. 35, 52 (1975) ("no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function"). However, the Commission observes a separation of functions between its investigatory functions and its adjudicatory functions. See Ceres Marine Terminals. Inc. v. Maryland Port Admin., 28 S.R.R. 806, 813 n.15 (1999) ("The Commission does have a separate bureau for conducting investigations and prosecuting alleged violations of the Shipping Act. . . This is the Bureau of Enforcement, which participated, entirely independently of the General Counsel's staff, in the proceeding [at issue]"). After a formal proceeding is initiated, BOE acts as a prosecutor, urging the Commission to

find a violation or violations of the statute. Prior to the initiation of the proceeding, however, BOE acts as an advisor to assist the Commission in determining whether to begin the proceeding in the first place.[4] In this capacity and at this stage in an investigation, BOE is properly seen as providing legal advice to the agency. Therefore, we find that the above referenced document is protected by the attorney-client privilege. Furthermore, in this matter, we assert our attorney-client privilege with regard to the memoranda prepared for the Commission as the client (Bates Nos. 2246-2468).

B. Application of the Protective Order

1. Signing the Protective Order

ADM argues that the protective order "does not make clear that the BOE should be required to sign the Consent to Protective Order," and goes on to suggest that except for the XLJ or Commissioners, "all other Commission personnel should be expected to acknowledge the existence and parameters of the order by signing a consent agreement or acknowledgment." ADM's Appeal at 5. BOE responds that the paragraphs of the protective order at issue make quite clear that only "the Administrative Law Judge, the Commissioners of the Federal Maritime Commission, the Commission's Office of General Counsel, the Commission's Secretary or the staff members of any of the above," are exempted from the requirement to sign consents. Protective Order at ¶3 and at 716. Nowhere is BOE

"The Office of the General Counsel also assists the Commission in this endeavor by "[r]eview[ing] for legal sufficiency all staff memoranda and recommendations that are presented for Commission action and staff actions acted upon pursuant to delegated authority under §§ 501.26(e) and 501.26(g)." 46 C.F.R. § 501.5(d)(l).

exempted from signing the consent form. Further, to the extent that ADM suggests that members of the Office of the General Counsel and the Secretary's Office be required to sign consents, the ALJ was correct not to require such action. Federal employees are subject to prosecution for improper disclosure of information. In addition, personnel in the offices in question fulfill the roles of judicial officers and court clerks. See ALJ's Order at 22.

2. Xttornevs' Eves Onlv Confidentiality

Before the ALJ, Bunge supported an "Attorneys' Eyes Only" classification drafted by other Respondents to address the alleged risk occasioned by disclosure of "commercially sensitive confidential business information" between Respondents in the course of discovery. Bunge reiterates that proposal in the instant appeal. In effect, such a classification would have assured that "commercially sensitive information produced by one Respondent could not be reviewed by any employees, including in-house counsel, of another Respondent." Bunge's Appeal at 5.

It appears that the ALJ's reason for denying such a classification was well-founded. The XLJ stated that while such restricted access is not without precedent, a strong showing of harm is necessary to justify this "rather drastic limitation." ALJ's Order at 18 (citing Doe v. District of Columbia, 697 F.2d 1115 (D.C. Cir. 1983) (trial judge reversed as protective order forbade disclosure by defendant's counsel to defendant of information obtained from plaintiffs in discovery)). The ALJ noted that no specific evidence was presented by Respondents as to the harm of disclosure, as the parties agreed that unlimited disclosure could lead to competitive disadvantage. Id. BOE, in its reply to Bunge's appeal, points out that Bunge does not explain how the established limitation fails to protect it from misuse of

confidential information. BOE's Reply to Bunge Appeal at 3. Further, BOE opines that "this additional level of confidentiality is not needed here because the current Protective Order already strictly limits distribution of confidential information." Id.

Bunge's argument that BOE did not adequately support its position opposing an "Attorneys' Eyes Only" classification is inapposite as the burden to prove that a limitation is necessary falls upon the party proposing such a limitation. See ALJ's Order at 18 (citing 46 C.F.R. 502.201(i); and Fed. R. Civ. P. 26(c)). Bunge failed to prove such a necessity before the ALJ and fails to do so on appeal as well. In fact, Bunge's argument appears to center on the burdensomeness of the established classification system. Bunge, while requesting that a second tier be established, goes on to present an argument which would lead one to believe that they would be loath to use any classification but "Attorney's Eyes Only."

We believe that the protection ordered is adequate and fail to see how administering two different levels of confidentiality would be less burdensome. Therefore, we will not alter the protective order as proposed by Bunge.

3. Furnishing bv Respondents of Discovery Only to BOE

The ALJ sua sponte stated that:

> I see no reason why, when any party furnishes confidential information to BOE in response to BOE's interrogatories and requests for production, that such party should furnish such copies of the sensitive information to any other party. Therefore each respondent shall furnish the requested

information only to BOE.

ALJ's Order at 23. He did so "to provide additional assurance to the parties that sensitive information will be protected to the fullest extent possible within reason."[5] Id.

Bunge appealed this part of the ALJ's rulings, and BOE supports Bunge in its reply to Bunge's appeal. No other parties addressed this issue. In brief, Bunge argues that this limit gives BOE an "unfair advantage" in that "BOE alone will have access to all factual information and evidence." Bunge's Appeal at 2. Likewise, Bunge states, Respondents are prejudiced because "they will not have access to all the information that BOE will have." Id. Bunge concedes that Respondents could "propound discovery upon one another that parrots the BOE's discovery." Id. However, such duplication "serve[s] no purpose other than to unnecessarily expand the burden, in time and expense, to the Respondents and to unduly protract these proceedings by requiring additional, otherwise avoidable discovery." Id. BOE posits that "this requirement makes the presentation of BOE's case problematic inasmuch as the competitive information provided by one Respondent must be protected from disclosure to other respondents." BOE Reply to Bunge Appeal at 4.

Both Bunge and BOE present valid concerns. While the ALJ was clearly attempting to provide additional safeguards to protect against unnecessary disclosure of confidential information,

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[5]Bunge interprets the ALJ's language as denying Respondents access to both confidential and non-confidential information disclosed to BOE. Bunge Appeal at 7. It seems clear that the ALJ meant to limit the restriction to confidential information only, such that each respondent shall furnish requested confidential information only to BOE.

such protections may slow down an already protracted proceeding. In addition, as Bunge points out, a protective order ought to be "designed to promote efficiency and progress." See NPR Inc. v. Board of Commissioners of the Port of New Orleans, Issuance of Protective Order, 28 S.R.R. 1174 (ALJ 1999). The protective order set forth by the ALJ is sufficient to protect any information produced in discovery from improper disclosure. The further limitation ordered by the ALJ could unnecessarily complicate the discovery process. Therefore, this portion of the ALJ's ruling will be vacated.

Related to this issue, BOE asks in its Appeal whether in view of the ALJ's requirement, the Respondents' responses to the information requests, designated as informant's privilege material in the Vaughn index, ought to be provided only to the Respondent who submitted such responses. In keeping with the rationale just given, all such responses ought to be provided to each Respondent.

4. Use of Restricted Confidential Information Outside the Proceeding

ADM is concerned that the protective order allows that "the Commission, including BOE, may order or permit anyone to use Restricted Confidential Information for any matter simply by providing notice to the parties and an opportunity for hearing." ADM's Appeal at 2.[6] In addition, ADM posits that the protective

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[6]Paragraph 9 of the Protective Order reads in part: "Restricted Confidential Information shall not be used by . . .anyone other than Qualified Persons for their use in this proceeding in accordance with the other provision of this Order and those to whom the Administrative Law Judge or the Commission orders or permits disclosure after nouce to all parties and opportunity for hearing."

order does not protect under seal any Restricted Confidential Information once admitted into evidence. Id. ADM urges that the protective order be corrected to ensure that information cannot be disclosed by Commission personnel without permission of the presiding officer, and further that any decision to disclose be appealable to the Commission and then to a District Court.[7] ADM's Appeal at 3.

BOE submits that XDM is misreading the protective order. First, BOE explains that the language of the protective order reserves authority to permit disclosure solely to the Commission or ALJ. BOE's Reply to ADM at 2. Furthermore, BOE argues that the protective order permits only the Commission to order release of information outside of the proceeding. BOE clarifies that "it is the Commissioners, sitting as a decisionmaking body to whom reference is made" in the disputed paragraphs of the protective order. Id. XDM appears to misread the ALJ's Order and the protective order with regard to disclosure of information outside the instant proceeding. ADM appears to read "the Commission" to include Commission staff such as BOE. BOE interprets the protective order correctly, stating that "neither BOE nor Respondents can disclose Restricted Confidential Information unless and until the Commission or the XLJ issues an order authorizing such

[7]The protective order appears to include a typographical error which may have added to ADM's apparent confusion over this matter. In paragraph 9, reference is made to opposing disclosure "on the grounds set forth in paragraph 14." While no party addressed this error, it appears that "paragraph 14" should read "paragraph 13." The ALJ identified an error in BOE's Proposed Protective Order which led to the renumbering of each paragraph following paragraph 9. This change was apparently not carried through in the text of paragraph 9 itself.

disclosure and, then, only after notice and opportunity for hearing." Id.

Next, BOE refutes ADM's assertion that Restricted Confidential Information is stripped of its confidential status once admitted into evidence. BOE argues that nothing in Paragraph 12, or Rule 119 referred to therein, affects the confidentiality afforded by Paragraph 9. BOE's Reply to ADM at 3. Paragraph 12 allows only Qualified Persons, per the terms of the protective order, to be present at any proceeding during which Restricted Confidential Information may be disclosed. Further, the paragraph provides that Restricted Confidential Information becomes part of the record when admitted into evidence, and the Commission or the ALJ may use such information "if deemed necessary to a correct decision in the proceeding," pursuant to Rule 119(c), 46 C.F.R. § 502.119(c).

In his Order, the ALJ states that "it is not this judge's practice to disclose confidential information that must be considered in a decision and I have had no difficulty in issuing decisions that refer to such evidence in such a way as not to disclose sensitive matters." ALJ's Order at 23. The Commission's experience reflects similar treatment of such information. Thus, ADM's concern is unfounded. Paragraph 9 adequately protects all information submitted under the protective order from disclosure absent notice and opportunity for hearing.

ADM's request that it have a right of review to the Commission and then to a Federal district court when documents are to be disclosed outside the proceeding is untenable. Pursuant to 46 C.F.R. $502.227, any final order of an ALJ is appealable to the Commission, and, as in the instant case, the ALJ may certify discovery issues to the Commission. Thus, there are adequate existing routes of review by the Commission. While interlocutory

orders of the Commission such as the type involving discovery are generally not subject to appeal, any final order of the Commission is then appealable to a U.S. court of appeals.[8] ADM's suggestion that the Commission authorize by order an appeal to a U.S. district court must be denied for several reasons: the Commission is without the power to confer jurisdiction on any court; a district court lacks jurisdiction to hear appeals of Commission orders because that jurisdiction is the sole province of a U.S. court of appeals; and interlocutory orders disposing of discovery matters are not final orders.

Finally, ADM's request that any disclosure by BOE or other Commission personnel should first be reviewed by the Presiding Officer is misplaced." As discussed above, only the ALJ or the Commission, sitting as a decisionmaking body, may order disclosure pursuant to the protective order. Further, to limit such review to the ALJ is short-sighted, as the Commission will surely be the appropriate party to rule on such a matter when the proceeding has progressed and it is before the Commission.

[8]28 U.S.C. § 2342 (3)(B) states that "The court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all rules, regulations, or final orders of ... the Federal Maritime Commission."

[9]This argument by ADM may also reflect the fact that it believed "the Commission" to encompass Commission staff as well as the Commissioners as a decisionmaking body.

V. CONCLUSION

Based on the foregoing, we reverse the ALJ's decision to disclose to Respondents those documents to which BOE asserted the deliberative process or attorney work product privileges. To the extent that the documents might be disclosable, Respondents have not established a sufficient need for them. Furthermore, with respect to the document that the ALJ found to be covered by the attorney-client privilege but determined to release, we shall reverse the ALJ's order to disclose this document (Bates Nos. 2380-2404). Finally, we assert our attorney-client privilege with respect to the documents to which it applies (Bates Nos. 2246-2455), and Commissioner Brennan asserts his attorney-client privilege individually with respect to documents (Bates Nos. 2457-2468) as well.

We find that the protective order should be maintained for the most part as written by the ALJ. The portion of the ALJ's ruling limiting the production of responses to BOE's discovery of Respondents to BOE shall be vacated. Further, we find that each Respondent should receive all responses to the information requests ordered released by the XLJ.

THEREFORE, IT IS ORDERED, That the ALJ's finding to disclose documents for which BOE has asserted the deliberative process, attorney work product, and attorney-client privileges is reversed;

IT IS FURTHER ORDERED, That the Protective Order is affirmed to the extent discussed above; and

IT IS PURTHER ORDERED, That the ALJ's ruling limiting the production of responses to BOE's discovery of Respondents to BOE is vacated and all responses to BOE's

discovery requests shall be provided to each Respondent.

By the Commission.*

Theodore A. Zook
Assistant Secretary

*Commissioner John A. Moran not participating.